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Supreme Court of the United States

OCTOBER TERM, 1932

No. [redacted] 9

CULLEN FUEL COMPANY, INC., owner of the Deck Scow "CULLEN No. 32,"

Petitioner,

against

W. E. HEDGER, INC., bailee of cargo,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 772

CULLEN FUEL COMPANY, INC., owner of the Deck Scow "CULLEN No. 32,"
Petitioner,

against

W. E. HEDDEN, INC., bailee of cargo,
Respondent.

BRIEF ON BEHALF OF THE RESPONDENT AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement.

This is an application for a writ of certiorari by Cullen Fuel Company, Inc., owner of the scow *Cullen No. 32*, to review the decision of the United States Circuit Court of Appeals for the Second Circuit, wherein that Court denied to the petitioner the right to limitation of its liability for a cargo loss caused by the capsizing of the scow *No. 32* in New York Harbor on August 12, 1925.

The opinion of the Court is reported in 62 Fed. (2nd) at page 68.

Facts.

In order to understand the issues involved in this application it is necessary to supplement, to a considerable extent, the statement of facts contained in the petition.

The steamer *Berk* arrived at New York with a cargo of barytes ore consigned to Grasselli Chemical Company. The

Berk was tied up at the foot of Roosevelt Street, New York City, and the Grasselli Chemical Company employed W. E. Hedger Co., Inc., to transport the ore from the *Berk* to Grasselli, N. J. (Pierce, 515, Opinion, 958-959). On August 11, 1925, Hedger chartered, among others, the scow *No. 32* for the transportation of the ore to Grasselli (Sweet, 168; Pierce, 515-516).

Before the scow went under charter to Hedger, Sweet, the Marine Superintendent of her owner, purported to examine her to see if she was seaworthy. In that examination he went down in her hold, while she was lying light, and "looked at her deck beams" and at her sides "to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 184-185). Finding no broken planks nor any visible leaks, the scow was delivered to the charterer.

While the scow was in the process of loading the ore, she capsized and spilled her entire cargo, and both Courts below concurred in finding that the sinking was caused by pre-existing unseaworthiness of the scow.

ARGUMENT

I.

The result reached by the Circuit Court of Appeals was correct.

The District Court denied petitioner's right to limit liability upon the ground that the leaky condition of the scow could have been discovered by her owner if it had made a proper inspection of the vessel before putting her under charter.

The Circuit Court of Appeals considered it unnecessary to pass upon the holding in that respect, and held that the scow owner had breached its implied warranty of seaworthi-

ness, which defeated its right to limit liability. In this connection Judge SWAN said:

> "In the court below limitation was denied upon the ground that the fault existed with the owner's privity or knowledge because no adequate examination of the scow was made before her delivery on charter. Since we follow The Loyal, the correctness of this ruling need not now be determined."

In order to determine the correctness of the ruling of the District Court, and of the result reached by the Circuit Court of Appeals, it will be helpful to examine the evidence as to the inspection made of the scow by the petitioner before letting her under charter.

Sweet testified that he was the scow owner's Marine Superintendent, and that he had seen the boat before she went under charter, at which time he had "looked all around" (Sweet, 167, 169, 184). At that time the scow was light, drawing twenty inches to two feet (Sweet, 174-175).

On cross-examination the Marine Superintendent testified:

> "Q. Tell us exactly what you did when you made this examination? A. Well, I was down in there and I looked at her deck beams to see if they were—
>
> "Q. That is the beams, the upper beams on the deck? A. Yes; and I looked at her side to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 184-185).

Sweet's so-called examination was entirely visual, made when the scow was light, and he was content to rely on what he could see by flashing his light on her deck beams and side planks, and was apparently satisfied with the condition of the scow because he found no "planks broken."

Sambraus, petitioner's Vice President, admitted that such an inspection would not disclose the existence of a leak

above the light water line, and that "you have to guess at it" (Sambraus, 377).

The inadequacy of such an examination appears too clear to require argument.

Sweet purported to have also examined the outside of the scow's hull, but it developed that such "examination" was made by standing on her deck and looking down over her gunwale. Moreover, he could only see one of her sides at that time, for the other side was up against the pier (Sweet, 218).

It was not shown how old *No. 32* was, when she had last been caulked or in drydock for repairs, whether or not anything had happened to her between the time she carried her last cargo and the time she went under this charter, or that there was any regular system employed by petitioner with reference to the proper upkeep of its vessels.

Sweet testified that a record was kept by petitioner of all of its boats going into drydock for repairs, and that he had not even looked up those records to see when *No. 32* had last been repaired (Sweet, 200-201). Although he was petitioner's Marine Superintendent, he did not know the age of *No. 32* (Sweet, 203). As an apparent afterthought, he said that he had made an effort to locate the records, but could not find them (Sweet, 206); and that he "imagined" that the scow was at Jersey City Drydocks "within a year" before this casualty,—"I should think about eight months" (Sweet, 208-209).

It appears quite clear that the District Judge did not believe even Sweet's vague testimony concerning the upkeep of and repairs to the scow; for on the first day of the trial the Court warned the witness of the necessity of producing records of repairs from the drydocks. On Sweet's examination the following occurred:

> "The Court: Did you have the boat under repairs down at the Jersey City Drydock?

The Witness: No, sir, at Hunts Point Drydock.

The Court: Well, you can find out from there when it was done. You had better get some information on that to show that she was repaired" (Sweet, 210).

The trial of this case started on November 13, 1930. On the following day, November 14, it was adjourned to November 17. It was resumed on November 17 and was finally concluded on November 18 (Record, 2-3).

The Court warned the witness of the necessity of producing records of repairs on the first day of the trial. Thereafter, five days were available to petitioner to subpoena the records of any drydock which had done repair work on the barge. None was produced.

Sambraus, appellant's vice-president, testified on November 14, the second day of the trial, as follows:

"Q. Have you endeavored to ascertain from the Jersey City or Hunts Point Drydock when this boat was in drydock? A. No.

Q. Made no endeavor at all? A. No, I haven't, for I have been unable to find out from our own records.

The Court: He says he has been working on his own records very hard, and it apparently never occurred to him to go across the river and try to get these from the drydocks" (Sambraus, 359-360).

Santos, the scow man, testified that he had been captain of *No. 32* for a year prior to this accident, and he did not remember the scow ever having gone to drydock (Santos, 336).

The whole question of the lack of privity or knowledge on the part of petitioner in the condition of the scow, and of her history prior to this loss, was so evasively and secretively

handled by petitioner that there is very little wonder that the District Judge said:

> "It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind.
>
> "The records of this particular scow perhaps may have been lost as is claimed during the moving of her owner from one office to another, but her owner's officers knew very well where all her repairs had been made and they did not call anyone from the repair yards to testify in regard to her" (Opinion, 984-985).

The burden of proof is upon the petitioner to show its lack of privity or knowledge in the unseaworthy condition of the scow, and such privity or knowledge is equivalent to failure to exercise due care in the proper inspection of the scow before putting her under charter.

In *The Malcolm Baxter, Jr.*, 20 Fed. (2nd) 304, the Circuit Court of Appeals for the Second Circuit, discussing this question, said:

> "The evidence sustains the finding of the District Court that the Baxter was unseaworthy when she left New Orleans, and that such fact *could have been discovered by due diligence.* The petition to limit liability was properly denied" (305). (Italics ours).

In that case this Court granted certiorari, and affirmed the decision of the Circuit Court of Appeals. Mr. Justice STONE, speaking for this Court, said:

> "Both courts below agreed that the Baxter was unseaworthy on sailing, and that respondent failed to *exercise due diligence to ascertain her condition* before sailing. This was sufficient ground for denying the petition for * * * limitation of liability." (277 U. S. 323, 331). (Italics ours).

In the recent case of *The Calvert,* 51 Fed. (2nd) 494, the Circuit Court of Appeals for the Fourth Circuit denied limitation of liability to a barge owner upon this same ground, saying:

> "If the inspecting officers did not know of the very bad condition in which the Calvert was before entering upon this trip, such ignorance was due to negligence in making their inspections, or in not making them at all. We agree with the District Court in its findings that the defendant company here is not entitled to limit its liability. It has not sustained the burden which the statute casts upon it before it can claim the benefit of this limitation" (498).

In the case of *Sanbern* v. *Wright,* 171 Fed. 449, aff'd (CCA 2) 179 Fed. 1021, a boat sank and lost her cargo without any apparent cause. The boat was held unseaworthy and her owner was denied the right to limit liability upon the ground that the responsible agent of the owner had failed to conduct a proper inspection of the boat before she was put into service. The Court said:

> "It is urged that the respondent if liable by reason of the condition of the vessels, is entitled to limit its liability to their value. * * * The determination of the question depends upon *which of the respondent's officers or agents knew or should have known of the condition of the vessels and what he did to inform himself thereof.* The president of the respondent was not able to testify to their condition because he did not keep himself familiar with it. He said that Mr. Mulvaney was general superintendent of such affairs and was expected to see that the boats were kept in good condition. There can be little doubt that Mulvaney was the one to whom the condition of the vessels should have been known. The Republic, 61 Fed. 109, 113, 9 C. C. A. 386. His testimony discloses that *he performed the duty of inspection in a very perfunctory manner.* He said in testifying about the

> Eagle that they did 'whatsoever had to be done; if the boat leaked in the bottom we put her on the dock and tended to it; if she wasn't leaking we didn't spend any money.' That is, it was left to the progress of decay to develop signs of weakness. * * * I can not regard such a method as a proper one in the performance of the duties of inspection, the burden of showing which was upon the vessel's owner. The Colima (D. C.) 82 Fed. 665, 679." (455) (Italics ours).

Thus, it is apparent that a vessel owner cannot claim to be without privity or knowledge of unseaworthiness if he fails to use diligence to inform himself of the condition of the vessel.

In the instant case, Sweet, the Marine Superintendent, was the one to whom the petitioner entrusted the duty of inspecting the scow. His own testimony shows that he performed his duty in a most perfunctory manner. He went down in the scow's hold and just "looked around" with a flashlight to see if any of her timbers were broken. The scow was only drawing twenty inches to two feet at the time, and it is clear that no leak would have been then visible. With respect to the tightness of her seams, he was content to look down the scow's sides by peering over her rails. He confined his "inspection" to what was revealed by his naked eye.

In *The Northern Belle,* 154 U. S. 571, Mr. Justice MILLER, delivering the opinion of this Court, said:

> "It is the duty of the carrier who offers * * * barges for service to have them often examined and thoroughly inspected so as to be sure of their condition. He should not use a barge after she has become, from age, or decay, or injury, unfit for use, and should repair them often and well, so long as they can by repairing be safely used, and no longer.
>
> "For this the best interest of all parties requires that he shall be held rigidly responsible." (572).

The case of *Oregon* v. *Portland* (D. C. Ore.) 162 Fed. 912, involved the question of the right to limit liability for the sinking of the barge due to unseaworthiness. The officers of the corporate owner testified that they had inspected the barge. The Court denied the petition to limit, saying:

> "No expert or other person was appointed or required by either the manager or superintendent of the lumber company (petitioner) to make a survey of the barge Monarch to determine with respect to her seaworthiness—or fitness to undergo the service to which she was appointed under the demise; but these officers depended solely upon their own skill and ability for ascertainment of her condition" (921).

In re Meyers Excursion & N. Co., 57 Fed. 240, aff'd *The Republic* (CCA 2) 61 Fed. 109, a barge was hired to take a party on an excursion. In the course of the trip the barge encountered a severe wind storm, which lifted her hurricane deck and blew over the masts, killing several of the excursionists. The barge owner petitioned to limit its liability. The petition was dismissed. Judge BENEDICT said:

> "A proper examination of the vessel surely would have disclosed the unsound condition of the masts. * * * Such an examination would have disclosed the fact that the fastenings of the hurricane deck were insufficient. The petitioners *cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put*" (242-3) (Italics ours).

These cases, we respectfully submit, are directly in point with the case at bar, and go much further than the principle for which we contend. In the *Meyers* case the barge en-

countered a storm of some severity, but the Court held that the barge owner was not entitled to limit, inasmuch, as a *proper examination* would have disclosed the unseaworthy condition of the vessel. In the case at bar, there was no storm and the scow careened and sank in a calm and sheltered slip, undoubtedly as a result of a leak in her hull above her light water line, which was hot discovered in Sweet's cursory "inspection."

See also:

In re Reichert Towing Line (CCA 2) 251 Fed. 214, 217; cert. den. 248 U. S. 565;

In re P. Sanford Ross (CCA 2) 204 Fed. 248, 250-251;

Chesapeake, etc., Co. v. *Baltimore* (CCA 4) 40 Fed. (2) 394.

There can be very little doubt, it is submitted, that the negligence of Sweet, petitioner's Marine Superintendent, was sufficient to defeat the right of limitation. In such cases it has been frequently held that the negligence of the Managing Agent or Superintendent is the negligence of the owner.

In *Great Lakes Towing Co.* v. *Mills Transportation Co.* (CCA 6) 155 Fed. 11, cert. den. 207 U. S. 596 the Court said:

> "The acts of the *managing agent* within the sphere of his authority are as much the acts of the owner as if done by the owner himself." (21).

In accord, see:

In re P. Sanford Ross, Inc. (CCA 2) 204 Fed. 248,—neglect of petitioner's superintendent;

Sanbern v. *Wright & Cobb Lighterage Co.*, 171 Fed. 449, aff'd (CCA 2) 179 Fed. 1021,—failure of general superintendent to make proper inspection of unseaworthy boat;

In re Jeremiah Smith & Sons, Inc. (CCA 2) 193 Fed. 395,—neglect of managing agent of line at one of its terminal ports;

Parsons v. *Empire Transportation Co.* (CCA 9) 111 Fed. 202, cert. den. 183 U. S. 699,—knowledge of local agent at St. Michaels, Alaska;

The Benjamin Noble, 232 F. 382, aff'd (CCA 6) 244 Fed. 95, affirmed 249 U. S. 334,—act of managing agent in concurring in overloading;

Texas & Gulf S. S. Co. v. *Parker* (CCA 5) 263 Fed. 864, cert. den. 253 U. S. 488,—negligence of manager;

The Bessie J., 268 Fed. 66 (D. C. Mass.), aff'd (CCA 1) 276 Fed. 778, cert. den. 258 U. S. 620,—knowledge of fleet manager of negligent custom of masters;

Erie Lighter No. 108, 250 Fed. 490,—superintendent of the marine department of a railroad company.

II.

The case of *Earl & Stoddard* v. *Ellermans Wilson Line, Ltd.*, is not in point with the issues involved here.

Earl & Stoddard v. *Ellermans Wilson Line, Ltd.* (*The Galileo*) 77 L. Ed. 242, 1933 A. M. C. 1, dealt, not with the limitation of liability statute with which we are concerned here, but with the Fire Act, 46 U. S. C. A. sec. 182. In that case, Mr. Justice BRANDEIS, delivering the opinion of this Court, was careful to limit the doctrine of the case to the Fire Act, and stated expressly that the decision was not to be confused with *The Malcolm Baxter, Jr., supra,* page 6, saying:

> "The courts have been careful not to thwart the purpose of fire statute by interpreting as 'neglect' of

> the owners the breach of what *in other connections* is held to be a non-delegable duty. Nothing contained in the opinion of this Court in The Malcolm Baxter, Jr. (France v. French Overseas Corp.), 277 U. S. 323, 72 L. Ed. 901, 48 S. Ct. 516, is to be taken as indicating a different view." (244-245). (Italics ours).

And in *The Malcolm Baxter, Jr.*, the denial of the plea for limitation of liability was placed by this Court and by both subordinate Courts upon the ground that the *Baxter* was unseaworthy on sailing, and that her owner *"failed to exercise due diligence to ascertain her condition"* (277 U. S. 331), which was the identical ground upon which the District Judge rested his decision denying limitation of liability to the petitioner (Opinion, 988-989).

That the statute dealing with the *limitation* of a vessel owner's liability and the statute dealing with his *total lack* of liability for fire losses are separate and distinct, and should not be confused with each other, is further shown by the words of Mr. Justice BRANDEIS in *The Galileo, supra,* where he said:

> "Here the inquiry is not whether there was a 'personal contract,' on which the shipowner can be held for the full amount of the loss, but whether he can be held liable at all. He cannot be held liable unless by agreement, or otherwise, he has waived the benefit of the fire statute." (77 L. Ed. 245).

The distinction is further borne out by the different rules of law applicable to the Acts respectively. For instance, under the Limited Liability Act the burden of proof is upon the vessel owner

> *The Benjamin Noble* (CCA 6) 244 Fed. 95, aff'd *Capital Transp. Co.* v. *Cambria Steel Co.*, 249 U. S. 334, 63 L. Ed. 631;

La Bourgogne (CCA 2) 144 Fed. 781, aff'd *Deslious* v. *La Compagnie,* 210 U. S. 95, 52 L. Ed. 973;

In re Reichert (CCA 2) 251 Fed. 214, cert. den. 248 U. S. 565, 63 L. Ed. 424;

McGill v. *Michigan* (CCA 9) 144 Fed. 788, cert. den. 203 U. S. 593, 51 L. Ed. 332;

In re Hedger (CCA 2) 59 Fed. (2nd) 982;

whereas under the Fire Act, the burden of proof is upon the cargo owner.

The Salvore (CCA 2) 60 Fed. (2nd) 683;
In re Old Dominion S. S. Co., 115 Fed. 845;
The Strathdon, 89 Fed. 374.

It is therefore respectfully submitted that the decision of this Court in *Earl & Stoddard* v. *Ellermans Wilson Line, Ltd., supra,* dealt solely with the fire statute and is altogether foreign to the issue presented in the instant case, and its doctrine is in no wise in conflict with the result reached by the Circuit Court of Appeals.

III.

The application for a writ of certiorari should be denied.

Respectfully submitted,

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THOMAS H. MIDDLETON,
On the Brief.